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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 638

THE AFRO-AMERICAN COMPANY,
A MARYLAND CORPORATION,
Petitioner,

v.

ALINE OWEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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INDEX

Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	4
Statement	5
Reasons for Granting the Writ	10
Conclusion	19
Appendix	21

Table of Citations

Cases

Alberts v. State of California, 352 U.S. 964, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) 4, 12, 16

Beauharnais v. Illinois, 343 U.S. 250, 265, 266, 96 L. Ed. 919, 72 S. Ct. 725 (1952) 10, 19

Begley v. Louisville Times Co., 272 Ky. 805, 115 S.W. 2d 315 (1938) 13

Black v. Nashville Bann. Pub. Co., 24 Tenn. App. 137, 141 S.W. 2d 908 (1939) 13

Bowerman v. Detroit Press, 287 Mich. 443, 283 N.W. 642, 120 A.L.R. 1230 (1932) 12

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340, 72 S. Ct. 329, 330, 96 L. Ed. 367 (1952) 18

Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 599 (1954) 4

Bridges v. California, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941) 10, 11, 14

Burstyn v. Wilson, 343 U.S. 495, 72 S. Ct. 777 (1952) 18

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942) 16, 18

PAGE

City of Albany v. Mayer, 99 Cal. App. 651, 654, 655, 279 P. 213 (1929) 11

Coleman v. MacLennan, 78 Kan. 711, 718, 725, 98 P. 28 (1908) 11

DeSavitch v. Patterson, 159 F. 2d 15 (1946) 13

Dewey v. Des Moines, 173 U.S. 193, 199 (1899) 4

Evening News Co. v. Bowie, 154 Md. 604, 141 A. 416 (1928) 12

Fox v. State of Washington, 236 U.S. 273, 35 S. Ct. 383, 59 L. Ed. 573 (1915) 18

Gitlow v. New York, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925) 11

Gordon v. News-Journal Co., 6 W.W. Harr. 396 (Del.), 176 A. 657 (1935) 13

Grosjean v. American Press Co., 297 U.S. 233, 249, 80 L. Ed. 660, 56 S. Ct. 450 (1936) 11, 12

Grossman v. Globe-Democrat Pub., 347 Mo. 869, 149 S. W. 2d 362, 365 (1941) 13

In the Matter of the "Evening News" (1886), 3 Times L.R. 255 14

James v. Powell, 154 Va. 96, 152 S.E. 53 (1930) 12

Kantor v. Dziennik Zjednoczenia Pub. Co., 295 Ill. App. 412, 13 N.E. 2d 31 (1938) 13

Kilgore v. Koen, 133 Or. 1, 288 P. 192 (1930) 12

Lancour v. Herald & Globe Ass'n., 111 Vt. 37, 17 A. 2d 253, 132 A.L.R. 486 (1941) 13

Little v. Allen, 149 Kan. 414, 87 P. 2d 510 (1939) 13

Mannix v. Portland Telegram, 144 Or. 172, 23 P. 2d 138, 142 (1933) 12

Mortensen v. Los Angeles Examiner, 112 Cal. App. 194, 296 P. 927 (1931) 13

Naegele v. MacFadden Publications, 292 N.Y.S. 851, 161 Misc. 684 (1936) 13

Near v. Minnesota, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931) 11, 12, 18

PAGE

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) 4

Pennekamp v. Florida, 328 U.S. 331 (1946) 10

Regina v. Carlile (1819), 3 B. and Ald. 167 14

Roth v. United States of America, 352 U.S. 964, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) 4, 12, 16

Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 336 (1947) 15

Sherwood v. Evening News Ass'n., 256 Mich. 318, 239 N.W. 305 (1931) 12

Shiell v. Metropolis Co., 102 Fla. 794, 136 So. 537 (1931) 12

Smith v. Buffalo Times, 209 N.Y.S. 225, aff'd. 209 N.Y.S. 921, 124 Misc. 495, 214 App. Div. 7 (1925) 12

Steele v. Brannan (1872), L.R. 7 C.P. 261 14

Stromberg v. California, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931) 11

Terminiello v. Chicago, 337 U.S. 1 (1949) 4

Thomas v. Collins, 323 U.S. 516, 530, 89 L. Ed. 430, 65 S. Ct. 315 (1944) 10

Thornhill v. Alabama, 310 U.S. 88, 101-102, 60 S. Ct. 736, 744, 84 L. Ed. 1093 (1940) 17

United States v. Harriss, 347 U.S. 612, 624, note 15, 74 S. Ct. 808, 815, 98 L. Ed. 989 (1954) 18

United States v. Petrillo, 33 U.S. 1, 7-8, 67 S. Ct. 1538, 1542, 91 L. Ed. 1877 (1947) 18

United States v. Ragen, 314 U.S. 513, 523-524, 62 S. Ct. 374, 378, 86 L. Ed. 383 (1942) 18

Warren v. Pulitzer Pub. Co., 336 Mo. 183, 78 S.W. 2d 404 (1934) 13

Washington Times Co. v. Bonner, 86 F. 2d 836, 66 App. D.C. 280, 110 A.L.R. 393 (1936) 13

White v. Nicholls, 3 How. (U.S.) 266 (1845) 11

Whitney v. California, 274 U.S. 357, 71 L. Ed. 675, 47 S. Ct. 641 (1927) 11

Statutes

PAGE

United States Code, Title 28, Sec. 1257 (3) 2
Obscene Publication Act of 1857 14

Miscellaneous

Ashley, *Say it Safely* (1956) 14
Cooley, *Constitutional Limitations* (8th ed., 1927) 10, 11, 12
Harper, *Torts*, Sec. 247 (1933) 12
Harper and James, *The Law of Torts* (1956) 14
Newell, *Libel and Slander*, 4th ed. 13
Odgers, *Libel and Slander* (6th ed. p. 221) 13, 14
Preserving Liberty of the Press by the Defense of Privilege in Libel Actions, 26 Cal. L. Rev. 226 (1938) 11, 12
Prosser, *Torts*, (1944) 14
Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech, 64 Yale L. Journ. 610 (1955) 11
Qualified Privilege to Report Legislative and Judicial Proceedings as a Guarantee of Freedom of the Press, 36 Va. L. Rev. 767 (1950) 11, 12
Spring, *Risks and Rights in Publishing*, (1952) 14
Starkie, *Slander*, vol. 1, p. 234 (1843) 14
Thomas, *The Law of Libel and Slander* (1949) 14
Wittenberg, *Dangerous Words* (1947) 14
Yankwich, *Essays in the Law of Libel* (1929) 11
Yankwich, *It's Libel or Contempt If You Print It* (1950) 15

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Appeals of the State of Virginia (the Virginia Court of last resort) entered in the above entitled case on September 6, 1957.

OPINION BELOW

The judgment of the Circuit Court of Dinwiddie County (trial court), dated January 12, 1957, is unreported and is printed in the Record (File 2, R. 96-97). The decision of the

Supreme Court of Appeals of Virginia dated September 6, 1957, printed in Appendix hereto, *infra*, p. 21, is also unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on September 6, 1957. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3), petitioner having asserted in the courts below rights conferred by the Constitution of the United States.

How The Federal Questions Were Presented

The judgment of which review is sought is the judgment of the Supreme Court of Appeals of Virginia denying petitioner's original petition for a writ of error seeking to review a judgment of the trial court ordering petitioner to pay to respondent the amount of a jury verdict returned against petitioner in a civil libel suit.

In substance, the allegations before the Supreme Court of Appeals of Virginia, insofar as pertinent to the jurisdiction of this Court, were that petitioner had been denied constitutional rights of free speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution in that the trial court (1) held that the privilege of reproducing judicial proceedings was no defense in a civil libel suit if the publication were "obscene or otherwise indecent and unfit for publication" (File 2, R. 273), (2) permitted the issue of obscenity to be decided by the jury although the publication in question was clearly not obscene as a matter of law, and (3) gave instructions to the jury concerning obscenity, indecency and fitness to publish which were insufficient, undefined, incorrect, and provided no reasonable guides nor standards for the jury to follow.

Petitioner asserted the aforesaid constitutional rights both in its written Argument accompanying its Petition for Writ of Error to the Supreme Court of Appeals of Virginia (File ., R. 321, 322), more specifically where it asserted that the privilege of a newspaper to publish a fair and accurate account of a judicial proceeding was a part of federal Constitutional free speech and press under the First and Fourteenth Amendments of the United States Constitution (File 2, R. 321, 322) and in the trial court where it asserted said privilege in its demurrer (File 1, R. 13), Motion for Summary Judgment (File 1, R. 53, 54), Motion to Set Aside (including Motion for New Trial and Remittitur) (File 2, R. 91-92) and Motion for Judgment *non obstante veredicto* (File 2, R. 93-94). And see File 2, R. 268, again on freedom of press.

Without waiving the above-stated objections, petitioner also asserted the absence of obscenity in the instant publication as a matter of law and further objected to the incorrect and insufficient instructions to the jury on the lack of definition of obscenity (File 2, R. 267, 270, 273-274, 291). It also raised these objections in its Motion to Set Aside (File 2, R. 91-92), Motion for Judgment *non obstante veredicto* (File 2, R. 93-94) and Motion for Summary Judgment (File 2, R. 53-54) as well in its written Argument accompanying its petition for writ of error to the Supreme Court of Appeals of Virginia (File 2, R. 325-328).

The matters of newspaper privilege and obscenity (and "indecency" and "fitness to publish") were interposed at every available opportunity and clearly rested upon the aforesaid constitutional basis and must of necessity have been so understood by the Supreme Court of Appeals of Virginia because not only did said Court pass upon the merits of petitioner's constitutional objections in denying the writ and characterizing the trial court's decision as "plainly right" (Appendix p. 21) but, also, *in the record* before said

appellate court were contained the full decisions of this Court in the cases of *Roth v. United States of America*, 352 U.S. 964, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) and *Alberts v. State of California*, 352 U.S. 964, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) which were cases concerning Federal and State action in regard to obscenity and free speech (File 2, R. 358-363).

Moreover, apart from petitioner's specific reliance on the federal Constitution set forth above, the appellate court must have understood that petitioner's assertions of "privilege" and objections concerning "obscenity" "decency" and "fitness to publish" were based upon freedom of speech and press as protected by the First and Fourteenth Amendments to the United States Constitution, and were intended to raise these constitutional grounds. "(Since) the record as a whole shows . . . by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928), cited with approval in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 599 (1954). See *Dewey v. Des Moines*, 173 U.S. 193, 199 (1899). Cf. *Terminiello v. Chicago*, 337 U.S. 1 (1949).

The trial court, as stated before, sent the case to the jury to determine whether an alleged "obscenity, indecency and fitness for publication" exception was present in spite of petitioner's constitutional objections. The Supreme Court of Appeals of Virginia refused petitioner's application for writ of error on the ground that the trial court's decision was "plainly right"; *no opinion or citation of cases was rendered* (Appendix p. 21).

QUESTIONS PRESENTED

A. Whether a State, which permits one of its citizens to recover monetary damages for alleged libel committed by

a newspaper which published a fair, impartial, and accurate account of a judicial proceeding taken from public records, thereby violates the newspaper's constitutional rights of free speech and press as protected against state encroachment by the Fourteenth Amendment to the United States Constitution?

B. Whether a State, by creating an exception to the privilege of a newspaper to publish a fair and accurate account of a judicial proceeding, namely, permitting a jury to determine whether or not the privileged matter is so obscene, indecent or otherwise unfit for publication, thereby encroaches upon the constitutional rights granted to said newspaper under the Fourteenth Amendment to the United States Constitution?

C. Whether the publication in question was clearly not obscene as a matter of law, i.e., under any reasonable definition of obscenity, so that the State court violated the First and Fourteenth Amendment free press guarantees by submitting the question of the existence of obscenity to the jury?

D. Whether the submission to a jury, by a State court, of issues of obscenity, indecency and unfitness to publish, without definition of said terms, guides or standards, in a civil libel suit so that the jury determined that the newspaper lost the privilege already granted it by the Court, violates the newspaper's constitutional rights of free speech and press as protected against state encroachment by the Fourteenth Amendment to the United States Constitution?

STATEMENT

Respondent Aline Owen is a married white woman residing in Virginia (File 1, R. 1). Petitioner, The Afro-American Company (hereinafter called "AFRO") is a bi-

weekly newspaper owned and operated by Negroes; it is incorporated in Maryland with headquarters in Baltimore, and has a Richmond, Virginia edition.

On October 27, 1952, respondent filed a $50,000.00 libel suit against the Afro and one Clara Mann Mitchell in the Circuit Court of Dinwiddie County, Virginia (File 1, R. 1-7). The alleged libels grew out of a divorce suit, the relevant facts of which may be briefly summarized as follows:

> On February 9, 1952, Arthur W. Mitchell, a former Congressman and the first Negro elected to Congress, filed suit for divorce in the Circuit Court of Dinwiddie County Virginia (File 1, R. 2, 86); he alleged that his wife, Clara Mann Mitchell (also a Negro) unduly nagged and complained, and that she had falsely accused him of adultery with an unnamed white woman living in the same community (File 1, R. 2). Mrs. Mitchell's answer, filed on March 11, 1952, denied adultery but averred *inter alia* that he flirted with the white woman; that the white woman was Aline Owen (respondent in the instant case), that Mr. Mitchell and Mrs. Owen threw kisses at one another, that Mrs. Owen lifted her dress and took out her breast before him, and that this kind of conduct continued even after he filed his suit for divorce (File 1, R. 3-5). On March 20, 1952, by formal decree of the Circuit Court of Dinwiddie County, it was ordered that the action be dismissed "agreed"; that Mr. Mitchell pay counsel fees and court costs, and that the "papers (complaint, answer, and decree) be placed among the ended cases of this court" (File 1, R. 70).

Mr. Wells, the Managing Editor of the Richmond AFRO at the time of the aforesaid divorce suit and AFRO's only

salaried news gatherer in Virginia, was responsible for collecting news in and around Richmond (including Dinwiddie County) and sending such news to AFRO in Baltimore, which would then publish the news and send the Richmond edition to Richmond for distribution in Virginia (File 2, R. 127-128). When Mr. Wells heard of the divorce suit, he drove immediately to the Dinwiddie Court Clerk's office, and, at his request, the Clerk showed him the official papers in the case (File 2, R. 205-207). Mr. Wells copied these papers and sent the information to AFRO in Baltimore.[1]

AFRO neither knew respondent nor bore any malice towards her, but Mr. Mitchell, as the first Negro ever elected to Congress and as a wealthy and prominent person in American Negro affairs, was immediate news to Negroes in the United States and particularly to Negroes in the state of Mr. Mitchell's residence, Virginia (File 2, R. 130-132). AFRO therefore published an almost verbatim account of the divorce proceedings on October 18, 1952, and sent its fair, impartial, and accurate account to Richmond for distribution (File 2, R. 129, 269). It toned down "breast" to "bosom" and left out certain other phrases contained in the legal answer of Mrs. Mitchell (File 1, R. 66, File 2, R. 135).

Respondent based her libel suit against AFRO on the above-cited publication of October 18, 1952 only.[2] On No-

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[1] Although Mr. Wells returned to check the accuracy of his copies, he was unable to look further at the court proceedings: the divorce papers had been removed from the Clerk's office contrary to the court's order (File 1, R. 70 and File 2, R. 193); Mr. Mitchell's private attorney, who had the papers in his possession, refused to let Mr. Wells see them without Mr. Mitchell's permission (File 2, R. 194, 195); the Judge in the divorce case (who also heard the instant libel case) informed Mr. Wells by telephone that he did not recall the details of the divorce case but would be in Dinwiddie in November, 1952 (File 2, R. 189).

[2] AFRO then published the text of the answer in the divorce suit on October 24, 1952, but respondent did not bring suit on this publication (File 1, R. 1-7).

vember 15, 1952, AFRO demurred to respondent's motion for judgment on the ground that the newspaper publication of a judicial proceeding derived from public records,[3] was privileged as a matter of law (File 1, R. 13-14), but the court overruled the demurrer. In its answer, AFRO admitted the publication in question and again asserted its privilege as aforesaid (File 1, R. 15-17).

On March 3, 1954, AFRO moved for summary judgment; in its accompanying affidavit, AFRO averred that the publication was a fair and substantially accurate account of the judicial divorce proceedings and raised the privilege once more (File 1, R. 15-17). Mrs. Mitchell, the other defendant in the instant suit, moved for summary judgment on September 1, 1954, on the ground that her statements were made in the course of a judicial proceeding (File 1, R. 74). The trial court sustained Mrs. Mitchell's motion and granted her judgment (File 1, R. 102), but overruled AFRO's motion on July 10, 1956 (File 2, R. 77).

The trial was held on October 26, 1956, before a jury of seven white persons. Respondent offered testimony and evidence purporting to show that the publication was false and defamatory; *her* case also contained both the publication of October 18, 1952, and the official papers in the divorce proceeding upon which the publication was based (File 2, R. 210-226). Respondent offered no medical testimony of harm or injury incurred as a result of AFRO's publication; all of her witnesses, moreover, testified that her reputation was the same, namely, good, both before and after the publication, and some testified that they had heard stories of her improprieties with Mr. Mitchell before the divorce suit as well as before the newspaper report (File 2,

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[3] Neither the Judge, parties, counsel, nor Commonwealth Attorney for Dinwiddie County, ever asked for the divorce papers to be sealed and these official papers never were sealed.

R. 255-258). At the end of respondent's case, the AFRO moved the trial court "to strike" and to grant judgment in its favor on the ground of the aforesaid privilege (File 2, R. 267-271).

The trial court, over respondent's objection, ruled as a matter of law (1) that the divorce proceeding from which the publication was derived did constitute a judicial proceeding, (2) that AFRO published the divorce proceeding fairly, impartially, and substantially accurately, and (3) that therefore AFRO was entitled to a privilege (File 2, R. 273).

The Court, however, stated that he was still going to submit to the jury the question of whether AFRO's publication was so obscene, indecent, or otherwise unfit for publication as to constitute an "exception" to the privilege rule[4] (File 2, R. 273). The AFRO objected on grounds of its privilege and also that the Court did not define "obscenity", "indecency" or "otherwise unfit to publish" nor did it furnish the jury with any guides or standards to be used by the Jury in connection with said words (File 2, R. 273, 274, 300, 301). The AFRO introduced no testimony but rested on its legal objections (File 2, R. 267-271). The jury returned a verdict for $25,000.00 against AFRO (File 1, R. 7).

AFRO, which had introduced no testimony, on October 29, 1956 moved for judgment *non obstante veredicto* and moved to set aside the verdict as excessive and for new trial (File 2, R. 93-94); the trial court overruled same on January 12, 1957 (File 2, R. 96-97).

AFRO thereupon, on January 21, 1957, gave notice to the court of last resort, the Supreme Court of Appeals of Vir-

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[4] Although obscenity is a crime under the laws of Virginia, neither AFRO nor anyone else has ever been prosecuted for obscenity in connection with the divorce case or publications concerning it.

ginia, of its intention to apply for a writ of error (File 2, R. 103-105). It filed a petition and written Argument on May 6, 1957 (File 2, R. 299-349). On September 6, 1957, the Supreme Court of Virginia refused AFRO's application, stating that the lower court's decision was "plainly right;" the court's refusal to grant the writ was accompanied neither by a written opinion nor by any citation of cases (Appendix p. 21). On October 7, 1957, the Supreme Court of Appeals of Virginia ordered that execution on the judgment be stayed pending AFRO's petition to this Honorable Court for a writ of certiorari (File 2, R. 119).

REASONS FOR GRANTING THE WRIT

1. The United States Supreme Court has never decided whether the privilege of a newspaper to publish a fair and accurate account of a judicial proceeding is a constitutionally protected one, cf. *Beauharnais v. Illinois*, 343 U.S. 250, 265, 266, 96 L. Ed. 919, 72 S. Ct. 725 (1952), so that state action which seeks to nullify it by way of allowing a civil jury to determine questions of "obscenity", "indecency" and "unfitness to publish" (and therefore vitiate the privilege) is unconstitutional.

This privilege is a constitutional one and may not be limited. Compare *Bridges v. California*, 314 U.S. 252 (1941) and *Pennekamp v. Florida*, 328 U.S. 331 (1946), both of which gave constitutional status to the "privilege" of fair comment on judicial proceedings. Although there is no opinion on the instant privilege as yet, the present concept of liberty of the press is of relatively recent origin, Cooley, *Constitutional Limitations* (8th ed. 1927) at p. 880 and is one of our "preferred" freedoms, *Thomas v. Collins*, 323 U.S. 516, 530, 89 L. ed. 430, 65 S. Ct. 315 (1944).

There has been growing recognition that the privilege is a constitutionally protected one, cf. *Preserving Liberty of the Press by the Defense of Privilege in Libel Actions*, 26 Cal. L. Rev. 226 (1938); *Qualified Privilege to Report Legislative and Judicial Proceedings as a Guarantee of Freedom of the Press*, 36 Va. L. Rev. 767 (1950) and this is being gradually stated in the cases, *Coleman v. MacLennan*, 78 Kan. 711, 718, 725, 98 P. 28 (1908); *City of Albany v. Mayer*, 99 Cal. App. 651, 654, 655, 279 P. 213 (1929).

This Court, which has struck down prior restraint upon the press as being constitutionally invalid, has also struck down subsequent restraint no matter in what guise if it unduly impairs the right of free speech or free press.[5]

An attempt on the part of a state through its judiciary to allow a jury to remove this privilege in a libel action by permitting the jury to determine matters of obscenity, indecency and fitness for publication is a form of subsequent restraint that is obnoxious to the Fourteenth Amendment of the United States Constitution. This is particularly true where the newspaper is one with minority views unpopular with the then majority. *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 Yale L. Journ. 610 (1955).

The constitutional nature of the privilege rests upon public policy and is guaranteed because the good accruing

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[5] *White v. Nicholls*, 3 How. (U.S.) 266 (1845); *Gitlow v. New York*, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625 (1925); *Whitney v. California*, 274 U.S. 357, 71 L. Ed. 675, 47 S. Ct. 641 (1927); *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357, 51 S. Ct. 625 (1931); *Stromberg v. California*, 283 U.S. 359, 75 L. Ed. 1117, 51 S. Ct. 532 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233, 249, 80 L. Ed. 660, 56 S. Ct. 450 (1936); *Bridges v. California*, 314 U.S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941); see also Cooley, *supra*, at 885; Yankwich, *Essays in the Law of Libel* (1929), at 13-16; *Punitive Damages in Defamation Litigation; A Clear and Present Danger to Freedom of Speech*, 64 Yale L. Journ. 610 (1955).

to the public outweighs other interests, such as damage to personal reputation. See *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota*, 283 U.S. 697 (1931); and Cooley, *supra* at 885-886; Harper, *Torts*, Sec. 247 (1933); *Preserving Liberty of the Press by the Defense of Privilege in Libel Actions*, 26 Cal. L. Rev. 226 (1938) at 226, 227; *Qualified Privilege to Report Legislative and Judicial Proceedings as a Guarantee of Freedom of the Press*, 36 Va. L. Rev. 767 (1950).

It is conceded that a State may punish the press for obscenity under a properly drawn statute which adequately defines the evil from which the people of the State are to be protected and which is implemented by judicial instructions properly applying the statutory definitions so that juries may correctly decide the issue of obscenity, *Roth v. United States of America, supra*, and *Alberts v. California, supra*.

However, it is to be crucially noted in this case, that the AFRO was not indicted by the *State* for *obscenity* — it was punished by an *individual* who obtained a substantial money verdict for the AFRO's alleged obscenity in a *civil libel action*.

No case in the United States has ever imposed any "obscenity" exception to the privilege of publishing judicial proceedings. Although every State recognizes this privilege,[6] no State has held that "obscenity" vitiates the priv-

[6] *Smith v. Buffalo Times*, 209 N.Y.S. 225, aff'd. 209 N.Y.S. 921, 124 Misc. 495, 214 App. Div. 7 (1925); *Evening News Co. v. Bowie*, 154 Md. 604, 141 A. 416 (1928); *Kilgore v. Koen*, 133 Or. 1, 288 P. 192 (1930); *James v. Powell*, 154 Va. 96, 152 S.E. 53 (1930); *Sherwood v. Evening News Ass'n.*, 256 Mich. 318, 239 N.W. 305 (1931); *Shiell v. Metropolis Co.*, 102 Fla. 794, 136 So. 537 (1931); *Bowerman v. Detroit Press*, 287 Mich. 443, 283 N.W. 642, 120 A.L.R. 1230 (1932); *Mannix v. Portland Telegram*, 144 Or. 172, 23 P. 2d

ilege except Virginia in the instant case. The only support for the action taken by the trial court in this case is the statement made by an English text writer in 1881[7] and later repeated by an American text writer word for word in 1891. (Newell, *Libel and Slander*, 4th ed. at p. 221.) This authority however is completely inapplicable in the instant case for three independent reasons:

First, the English text writer was referring only to criminal libel cases when he discussed the "obscenity" exception.[8]

Secondly, the history of the English version of privilege demonstrates why the "obscenity" exception has never been applied in a civil case but only in criminal ones, and

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138, 142 (1933); *Warren v. Pulitzer Pub. Co.*, 336 Mo. 183, 78 S.W. 2d 404 (1934); *Gordon v. News Journal Co.*, 6 W.W. Harr. 396 (Del.), 176 A. 657 (1935); *Naegele v. MacFadden Publications*, 292 N.Y.S. 851, 161 Misc. 684 (1936); *Washington Times Co. v. Bonner*, 86 F. 2d 836, 66 App. D.C. 280, 110 A.L.R. 393 (1936); *Mortensen v. Los Angeles Examiner*, 112 Cal. App. 194, 296 P. 927 (1931); *Begley v. Louisville Times Co.*, 272 Ky. 805, 115 S.W. 2d 315 (1938); *Kantor v. Dziennik Zjednoczenia Pub. Co.*, 295 Ill. App. 412, 13 N.E. 2d 31 (1938); *Black v. Nashville Bann. Pub. Co.*, 24 Tenn. App. 137, 141 S.W. 2d 908 (1939); *Little v. Allen*, 149 Kan. 414, 87 P. 2d 510 (1939); *Grossman v. Globe-Democrat Pub.*, 347 Mo. 869, 149 S.W. 2d 362, 365 (1941); *Lancour v. Herald & Globe Ass'n.*, 111 Vt. 37, 17 A. 2d 253, 132 A.L.R. 486 (1941); *DeSavitch v. Patterson*, 159 F. 2d 15 (1946).

[7] "There are, however, two cases in which reports of judicial proceedings, although fair and accurate, are not privileged, and are indeed illegal. . . . (2) The second is where the subject matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings, for such report may itself be indictable as a criminal libel." Odgers, *Libel and Slander* (6th ed. p. 221).

[8] Note that when Odgers speaks about an exception he says that obscenity would be "illegal" meaning punishable as a *crime*. He says that such report "may itself be indictable as a criminal libel," Odgers, *supra* at 221.

the English cases upon which Odgers relies are clearly distinguishable from the instant case.[9]

Thirdly, the framers of the United States Constitution never followed the English notion of liberty of the press as the American concept of free press is broader than the English. "The English common law is inapplicable in the United States on questions concerning liberty and press." *Bridges v. California*, 314 U.S. 252, 263 (1941). In addition to the case law discussed above, American text authorities mention nothing about the "obscenity" exception in a civil libel case; See Ashley, *Say it Safely* (1956); Harper and James, *The Law of Torts* (1956); Prosser, *Torts* (1944); Spring, *Risks and Rights in Publishing* (1952); Thomas, *The Law of Libel and Slander* (1949); Wittenberg, *Dan-*

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[9] He cites as his authority the case of *Regina v. Carlile* (1819) 3 B. & Ald. 167, where a man had been convicted for selling an obscene publication (Paine's "Age of Reason") and his wife then published the whole book. The Court held that the privilege did not extend to such a colorable reproduction of a blasphemous book and that was unlawful. This had been previously covered by Starkie who stated the same principle, Starkie, *Slander*, vol. 1, p. 234 (1843).

The other important English case which no doubt influenced Odgers is *Steele v. Brannan* (1872) L.R. 7 C.P. 261, where pamphlets had been destroyed by a police magistrate on the ground that they contained obscene matter punishable at common law. The case, which was brought on information under the Obscene Publication Act of 1857, stated that although the defendant had published fair account of the trial of one George McKay (charged with selling certain obscene material) that one may not republish obscenity and cited *Regina v. Carlile*, *supra* and Starkie, *supra*.

Even after Odgers published his text, the English courts recognized that there had been no case in which a newspaper had been criminally charged as the result of publishing a divorce proceeding and although we concede that such can be the case, it is only the *state* which can punish the newspaper for obscenity. See *In the Matter of the "Evening News"* (1886) 3 Times L.R. 255 which involved a case where a private person applied to criminally prosecute a newspaper as the result of its publishing obscene and inflammatory reports of a divorce proceeding. The application was refused and case went off on the question of whether the proceeding would have to be brought by indictment.

gerous Words (1947); Yankwich, *It's Libel or Contempt If You Print It* (1950).

State action, whether by the judiciary or legislature which abridges this privilege is invalid, and the fact that it is done by a judge in a civil libel suit does not lessen the unconstitutional effect. cf. *Shelley v. Kraemer*, 334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 336 (1947).

2. A state can prosecute a newspaper under its police power if it publishes obscene matter and the result of such action my be fine, imprisonment or both, all to the benefit of the State. But a private person cannot, for her *own* benefit, punish a newspaper for obscenity through the medium of a libel suit. A private person may recover damages for *libel* but if there is a privilege then such privilege becomes a defense *even though the published matter be obscene!* A newspaper may win a libel suit as against a private person and still be criminally convicted of obscenity.

Yet even though the trial court granted the AFRO a privilege, it permitted *respondent* to punish the AFRO because the jury thought the AFRO was obscene! This presents a matter of great public importance, because the removal of the privilege relegates the press to a position where truth is its only defense. In the light of today's affairs, with the highly organized and far flung communicatory media (including the press) attempting to report to the public the affairs of the various governmental units and organizations (courts, legislatures, executives and administrative agencies), the press has absolutely no way to insure the truth of everything that occurs in official government. If the law requires the press to ascertain the truth of all official utterances prior to publication, this would be a greater prior restraint today than any censorship ever previously contemplated. The public would be deprived of

knowledge because the press would be fearful about publication unless it could verify every statement made in a court. There have been thousands of divorce cases in the United States based upon adultery (a ground of divorce commonly permitted by most states) and there have likewise been thousands of articles written about such cases — but this is the first case in which a newspaper had to pay damages for fairly and accurately publishing the account of a divorce case.

3. Under all of the Constitutional standards laid down by this Court, the language submitted by the trial court to the jury was, *as a matter of law*, not obscene. The language in question was:

> "that she (Mrs Mitchell) had seen Mr. Mitchell and the woman (respondent) flirting, throwing kisses at each other. . . ."
>
> ". . . saw woman (respondent) . . . exposing her bosom and lifting her dress as Mr. Mitchell stood in garden. . . ."
>
> "Mrs. Mitchell had stated publicly that he (Mr. Mitchell) was having an illicit affair with a white neighbor . . ." (File 1, R. 2).

Even if a State may restrict the privilege in a civil case, the above language was, as a matter of law, not "obscene or otherwise indecent and unfit for publication", *Roth v. United States of America, supra; Alberts v. California, supra.* (An appendix prepared for the Virginia appellate court shows that the entire AFRO publication contains no obscenity or indecent language, File 2, R. 340-349). Not only did the language not contain such utterances that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" *Chaplinsky v. New*

Hampshire, 315 U.S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031 (1942) but instant language was reasonably related to "a matter of public concern" cf. *Thornhill v. Alabama*, 310 U.S. 88, 101-102, 60 S. Ct. 736, 744, 84 L. Ed. 1093 (1940).

That a wealthy and prominent Negro who had been elected to Congress was charged by his wife with improprieties is a matter of public concern, and American Negroes, through their press, have a right to be informed of *all* sides of Mr. Mitchell's character. In addition, the publication involved demonstrates that wealth and official status, in themselves, are not guarantees of perfection, a basic principle in any democratic society. When the existing test is applied, namely; "whether to the average person, applying contemporary community standards, the dominant theme of material taken as a whole appeals to prurient interest," it is seen that the AFRO's publication concerned itself with alleged force and violence between husband and wife; nagging complained of by each side; undue parsimony by one and excessive spending by the other; and allegations of marital inconsistency — all matters mundane in divorce cases, and when taken as a whole, not obscene under the tests applied by this Court.

4. Even if the trial court could remove the said privilege by an exception which is to be found in no case and even if the above language is properly a matter to be submitted to a jury, it is strenuously contended that the trial court did not *define* "obscenity", "decency" and "fitness for publication", *nor did the court give any standards whatsoever to the jury so that they could fairly reach a decision.* It simply instructed them that:

> "if they should believe from the evidence that the publication . . . contained such obscene language of and concerning the plaintiff, or language which is otherwise indecent and unfit for publication, then they shall find for the plaintiff" (File 2, R. 273).

When an all white jury in Virginia was thus instructed by a Judge in a case where a local white woman sued a foreign Negro newspaper, the result (a $25,000.00 verdict) is not hard to understand. Under no circumstances could such a vague standard pass the test of this Court as laid down in *United States v. Petrillo*, 332 U.S. 1, 7-8, 67 S. Ct. 1538, 1542, 91 L. Ed. 1877 (1947); see also *United States v. Harriss*, 347 U.S. 612, 624, note 15, 74 S. Ct. 808, 815, 98 L. Ed. 989 (1954); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S. Ct. 329, 330, 96 L. Ed. 367 (1952); *United States v. Ragen*, 314 U.S. 513, 523-524, 62 S. Ct. 374, 378, 86 L. Ed. 383 (1942); *Fox v. State of Washington*, 236 U.S. 273, 35 S. Ct. 383, 59 L. Ed. 573 (1915).

It is significant that all of the above cases involved criminal prosecutions and none involved civil libel actions *re* obscenity. What is more important, however, is that the instruction not only permitted the jury to itself determine "obscenity" but then permitted the jury to further determine that even if there were no obscenity, that they could *still* find for the respondent if the publication was "otherwise indecent and unfit for publication". This obviously allowed the jury to regulate the AFRO by its own interpretation of the AFRO's "fitness" and "decency" and thereby again offended the United States Constitution in its protection against limitation of free speech and press by vague and indefinite standards not relating to obscenity cf. *Chaplinsky v. New Hampshire, supra* at 571-572 and the *Near* case, *supra* at 716. There was not only no definition or even vague standards, there were no standards *at all!*

The same infirmities which led this Court to hold invalid prior moving picture restraint when it employed such a shifting standard as in *Burstyn v. Wilson*, 343 U.S. 495, 72 S. Ct. 777 (1952) applies even more forcibly to the mean-

ingless phrases used by the trial court to permit the jury to do away with the privilege.

The key to instant case is discovered in the following quotation:

> " 'While this Court sits' it retains and exercises authority to nullify action which encroaches freedom of utterance *under the guise of punishing libel.*" (Italics added.)
>
> *Beauharnais v. People, supra* at 263.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY O. LEVIN,
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Attornevs for Petitioner.

JAMES A. COBB,
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Of Counsel.

APPENDIX

Virginia:

In the Supreme Court of Appeals held at the Masonic Building in the City of Staunton on Friday the 6th day of September, 1957.

The petition of Afro American Company of Baltimore for a writ of error to a judgment rendered by the Circuit Court of Dinwiddie County on the 12th day of January, 1957, in a certain proceeding then therein depending, wherein Aline Owen was plaintiff and Afro American Company of Baltimore, etc., et al., were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the said Circuit Court.

A Copy,

Teste:

H. G. TURNER,

Clerk.

LIBRARY
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FILED
DEC 21 1957
JOHN T. FEY, Clerk

In the

Supreme Court of the United States

October Term, 1957

No. 638

THE AFRO AMERICAN COMPANY OF BALTIMORE, INCORPORATED, A MARYLAND CORPORATION,

Petitioner

v.

ALINE OWEN,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEO. E. ALLEN
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Richmond, Virginia
Counsel

TABLE OF CONTENTS

Page

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE PETITION BECAUSE NO FEDERAL QUESTION WAS RAISED OR DECIDED IN EITHER OF THE COURTS BELOW 1

TRIAL PROCEEDINGS 2

APPELLATE PROCEEDINGS 3

ARGUMENT — FEDERAL QUESTION 4

THE CASE ON ITS MERITS 7

TABLE OF CITATIONS

Cases

Andrew Duncan v. Henry Thwaites, 3 B. & C. 556 8

Barber v. St. Louis Dispatch Company, 3 Mo. App. 377 5

Cowley v. Pulsifer, 137 Mass. 392, 50 Am. Rep. 319 5

Darnell v. Davis, 100 Va. 707, 58 S. E. 2d 68 5

Durley v. Mayo, 351 U. S. 277, 76 S. Ct. Rep. 806, 77 S. Ct. Rep. 22 5

Finnegan v. Eagle Printing Company, 179 N. W. 788 5

Ilsley v. Sentinel Company, 126 Am. St. Rep. 928 5

Lundin v. Post-Publishing Company, 217 Mass. 213, 52 L. R. A. (NS) 207 5

Nixon v. Times-Dispatch Printing Co., 12 L. R. A. (NS) 183 5

Parsons v. Age-Herald, 61 So. 345 5

Roth v. United States, 77 S. Ct. Rep. 1304 8

Page

Southwestern Bell Telephone Company v. State of Oklahoma, 303 U. S. 206, 58 S. Ct. Rep. 528 4

Times-Dispatch v. Zoll, 148 Va. 850, 139 S. E. 505 5

Williams v. New York Herald, 150 N. Y. S. 838 5

Textwriters

33 American Jurisprudence, p. 153, Sec. 157 6

53 Corpus Juris Secundum, pp. 205, 207, 208 6

Gatley on Libel & Slander, 3d Edition, pp. 346-348 5

Newell on Libel & Slander, 4th Edition, p. 412, Sec. 384 5

Odgers on Libel & Slander, p. 220 5

Prosser on Torts, 2nd Edition, 1955, Chapter 19, p. 624 6

Restatement of Law of Torts-American Law Institute, Part 1, pp. 294, 295 5

Annotations

52 A. L. R. 1438 6

104 A. L. R. 1124 6

126 American State Reports 932 6

11 Annotated Cases 162 6

15 Annotated Cases 618 6

Annotated Cases 1915-A, p. 36 6

Annotated Cases 1915-A, p. 129 ..... 6, 7

12 L. R. A. (NS) 188 6

16 L. R. A. (NS) 953 6

38 L. R. A. (NS) 913 6

52 L. R. A. (NS) 207 6

In the

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No. 638

THE AFRO AMERICAN COMPANY OF BALTIMORE, INCORPORATED,
A MARYLAND CORPORATION,

Petitioner

v.

ALINE OWEN,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE PETITION BECAUSE NO FEDERAL QUESTION WAS RAISED OR DECIDED IN EITHER OF THE COURTS BELOW.

This Court has no jurisdiction to entertain the petition, because it does not appear from the record in the trial court or the record in the Supreme Court of Appeals of Virginia that a federal question was presented or decided in either court.

TRIAL PROCEEDINGS

The petitioner filed the following defensive papers in the trial court: a demurrer to respondent's motion for judgment; a statement of grounds of defense; a motion for summary judgment and the grounds thereof; exceptions of the petitioner to the action of the court in overruling its motion for summary judgment; a motion to set aside the verdict of the jury and the grounds thereof, and a motion for judgment *non obstante veredicto* and the grounds thereof.*

Petitioner did not even suggest a federal question in any of the foregoing papers.

Upon overruling the motion to set aside the verdict the court entered an order rendering judgment on the verdict and filed an opinion giving its reasons for overruling the motion. No federal question was mentioned either in the order or the opinion of the court.

The federal question presented to this Court in the petition for certiorari was not presented or decided in any manner in the trial court. This is plainly evident by the opinion of the court. The trial court's opinion expressed in a letter to counsel, is as follows:

> "Gentlemen: In re: *Owen v. Afro-American*
>
> "I have Mr. Allen's letter of November 2 and Mr. Lavin's letter also of November 2 in regard to the above case.
>
> "I held that the Mitchell divorce suit was such a judicial proceeding that the matters contained in the suit were privileged. But the law recognizes that even in privileged matters the privilege can be abused. (1) Where the papers were ordered sealed by the court; (2) Where the publication is not an accurate account

*References cannot be made to the record because counsel for respondent has not been served with a copy of the record.

of the proceedings; (3) Where the matters in the proceedings are unfit to print.

"The papers in the divorce suit were not sealed and I held upon the trial of the case that the account of the proceedings as published in the Afro-American was substantially correct and submitted the case to the jury on the third exception, which was whether or not the matters published in the Afro-American were unfit to print and by their verdict the jury decided that the matters so printed were unfit.

"This exception to the privilege of being matter unfit to print, seems to be generally recognized in the law books and is so stated in both Corpus Juris Secundum and American Jurisprudence under the heading of 'Libel and Slander' and in various cases decided in the United States, none of which were in Virginia. While this seems to be recognized law, the attorneys in this case on either side, have been unable to find a case in the United States in which this particular abuse of privilege has come to a higher court. This fact weakens to a certain extent the force of this law.

"However, as it seems to be the law, I am of the opinion that the motion to set aside the verdict in this case should be over-ruled and judgment entered on the verdict.

"Mr. Allen may draw the order in accordance with the above expressed views and submit it to the attorneys for the defendant, and then present it to me for entry.

"Very truly yours,

(s) J. G. Jefferson, Jr.
J. G. Jefferson, Jr."

APPELLATE PROCEEDINGS

Following the rendition of the judgment, petitioner filed a notice of appeal and a statement of its assignments of error as required by Virginia practice. No federal question

was mentioned in any of the assignments of error.

Under Virginia law, an appeal to the Supreme Court of Appeals is not a matter of right. A petition for an appeal has to be filed setting forth "the errors assigned and the questions involved in the appeal" (Rule 5:3(1); Rule 5:12).* The errors assigned in the petition for appeal in this case and the statement of the questions involved do not contain any federal question.

The Supreme Court of Appeals rendered no opinion. It merely entered the following order declining to review the case:

> (September 6, 1957)
>
> "The petition of the Afro American Company of Baltimore for a writ of error to a judgment rendered by the Circuit Court of Dinwiddie County on the 12th day of January, 1957, in a certain proceeding then therein depending wherein Aline Owen was plaintiff and Afro American Company of Baltimore, etc., et al were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the Court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error, the effect of which is to affirm the judgment of the said circuit court."

ARGUMENT — FEDERAL QUESTION

As stated by this Honorable Court in *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206, 58 S. Ct. Rep. 528:

> "The supreme court has no jurisdiction to review a state court decision unless it appears affirmatively from

* See Appendix.

> the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of federal question was necessary to determination of the cause, that federal question was actually decided, or that judgment as rendered could not have been given without deciding it. Jud. Code § 237, as amended, 28 U.S.C.A. § 344."

See also the late case of *Durley* v. *Mayo*, 351 U. S. 277, 76 S. Ct. 806, decided June 4, 1956, rehearing denied October 8, 1956, 77 S. Ct. Rep. 22.

The record in the Supreme Court of Appeals of Virginia shows that respondent, Mrs. Owen, filed a cross-assignment of error to the effect that the proceedings in the divorce suit, consisting of nothing but the bill of complaint and the answer without any judicial action thereon, did not constitute a judicial proceeding within the purview of the law of libel that a fair report of a judicial proceeding is privileged. In support of this cross-assignment of error it was shown that the authorities are practically unanimous in support of the contention. The Supreme Court of Appeals of Virginia might well have declined to review the case on this ground. *Times-Dispatch* v. *Zoll*, 148 Va. 850, 139 S. E. 505; *Darnell* v. *Davis*, 190 Va. 707, 58 S. E. 2d 68; *Coxley* v. *Pulsifer*, 137 Mass. 392, 50 Am. Rep. 319; *Lundin* v. *Post-Publishing Co.*, 217 Mass. 213, 52 L. R. A. (N.S.) 207; *Nixon* v. *Times-Dispatch Printing Co.* (Minn.), 12 L. R. A. (N.S.) 183; *Ilsley* v. *Sentinel Co.*, 126 Am. St. Rep. 928; *Williams* v. *New York Herald*, 150 N. Y. S. 838; *Finnegan* v. *Eagle Printing Co.*, 179 N. W. 788; *Parsons* v. *Age-Herald*, 61 So. 345; *Barber* v. *St. Louis Dispatch Co.*, 3 Mo. App. 377. *Restatement of Law of Torts*—American Law Institute, Part 1, pages 294-295; *Newell on Libel and Slander*, 4th Ed., page 412, Sec. 384; *Odgers on Libel and Slander*, page 220; *Gatley on Libel and Slander*, 3rd Ed.,

pp. 346-347-348; 33 Am. Jur., page 153, Sec. 157; 53 C. J. S., pp. 205, 207, 208; *Prosser on Torts*, 2nd Ed., 1955, Chap. 19, p. 624. See also the following annotations:

1. Publication of pleadings before they come before the court as privileged within law of libel. 11 Ann. Cas., page 162.
2. Publication of pleadings before they come before Court as privileged within the law of libel. 17 Ann. Cas., page 618.
3. The liability for libel or slander in the course of judicial proceedings. 126 Am. State Rep. 932.
4. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 12 L. R. A. (N.S.) 188.
5. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 38 L. R. A. (N.S.) 913.
6. To what proceedings in Court does privilege of publication attach? 16 L. R. A. (N. S.) 953.
7. Is the publication of pleadings or other papers before any hearing has been had thereon privileged? 52 L. R. A. (N.S.) 207.
8. Libel and Slander: Privilege as to reports of judicial proceedings as attaching to publication of pleadings, etc., before hearing. 52 A. L. R. 1438.
9. Libel and Slander: Privilege as to reports of judicial proceedings as attaching to publication of pleadings, etc., before hearing. 104 A. L. R. 1124.
10. What proceedings are within rule of privilege with respect to report of judicial proceedings? Ann. Cas. 1915-A, page 36.
11. Publication of pleadings before they come before court

as privileged within the law. Ann. Cas. 1915-A, page 129.

If the Supreme Court of Appeals of Virginia might have rested its decision upon this well-settled principle rather than upon the constitutional question (injected into the case for the first time in the petition to this Court), and there is nothing to show whether the Court rested its decision on this principle or upon the constitutional question, then this Court will have to refuse certiorari.

In the late case of *Durley* v. *Mayo*, 351 U. S. 277, 76 S. Ct. Rep. 806, this Court said:

> "'Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground; this Court will not take jurisdiction to review the judgment.' Stembridge v. State of Georgia, 343 U. S. 541, 547, 72 S. Ct. 834, 837, 96 L. Ed. 1130.
>
> "'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 U. S. 14, 18, 57 S. Ct. 350, 352, 81 L. Ed. 470; Lynch v. People of New York (ex rel. Pierson), 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."

THE CASE ON ITS MERITS

If the Court should grant certiorari in this case, it would have to affirm the judgments below on the merits of the case.

upon the authority of *Roth* v. *United States*, 77 S. Ct. Rep. 1304, decided June 24, 1957. In that case the Court said:

> "We hold that obscenity is not within the area of constitutionally protected speech or press."

And the test of obscenity approved by the Court was:

> "Whether to the average person, applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interests."

And the lower court's charge to the jury, as follows, was approved:

> "You and you alone are the exclusive judges of what the common conscience of the community is."

True, the *Roth* case was a criminal case, but in Virginia we have an obscenity statute similar to the one passed on in the *Roth* case, Virginia Code Section 18-113;* and we also have a statute providing for the recovery of damages for the violation of a criminal statute where any person suffers damages as a result of such violation, Virginia Code Section 8.652.*

It was expressly decided in the case of *Andreze Duncan* v. *Henry Thwaites*, 3 B. & C. 556 (1924), in the Court of King's Bench, that a plaintiff may recover of a defendant, for publishing a libel charging the plaintiff with indecent conduct to a female child notwithstanding a criminal prosecution would also lie against the defendant. This case also involved the privilege of publishing an accurate report of

*See Appendix.

judicial proceedings and it was held that no such privilege attached to the publication of obscenity appearing in a judicial proceeding.

It is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent,
Aline Ozeen

ALLEN, ALLEN, ALLEN & ALLEN
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Richmond, Virginia
Counsel

Rule 5:3, §1, of Rules of Supreme Court of Appeals of Virginia:

Rule 5:3. Petitions for Appeal and Briefs in Opposition

§1. Form and Contents of Petition. Except as provided in this Rule, and except when the appeal is a matter of right, the form and contents of the petition for appeal shall conform in all respects to the requirements for the appellant's opening brief, but need not be printed. The petition for appeal may be adopted as and in lieu of the opening brief if the election to do so is clearly stated therein. If so adopted it shall be printed and distributed as the record is printed and distributed under Rule 5:12, §4, except that it shall be printed under separate cover. The cost of printing shall be recoverable to the extent and under the conditions provided by Code, Section 14-179.

Rule 5:12. Briefs.

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

Virginia Code Section 18-113 as amended by the Acts of 1952.

§18-113. Publishing, etc., obscene books, motion pictures, etc.—If any person, firm, corporation, or association import, print, exhibit, publish, sell, lease, use or distribute any book, pamphlet, ballad, printed page, phonographic record, or other thing containing obscene language or which is otherwise indecent, or any print, picture, motion picture, film, figure, or description manifestly tending to corrupt the morals of youth, or introduce into any family or place of education, or buy or have in his possession any such article for the purpose of sale, exhibition or circulation, or with intent to introduce it into any family or place of education, he shall be guilty of a misdemeanor. (Code 1919, §4549; 1920, p. 340; 1952, c. 270.)

Virginia Code Section 8-652.

§8-652. Damages from violation of a statute, remedy therefor and the penalty.—Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages. And the damages so sustained together with any penalty or forfeiture imposed for the violation of the statute may be recovered in a

single action of trespass on the case upon proper counts when the same person is entitled to both damages and penalty; but nothing herein contained shall affect the existing statutes of limitation applicable to the foregoing causes of action respectively. (Code 1919, § 5785.)